U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 08 123 51481 Office: VERMONT SERVICE CENTER Date: AUG 05 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed and the director's and the AAO's decision will be undisturbed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice president as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware corporation, states that it is operating as a cotton merchant and exporter of raw material. It claims to be a subsidiary of Besto Tradelink Pvt. Ltd., located in Ahmedabad, India. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

In a decision dated April 27, 2009, the AAO affirmed the director's decision and dismissed the appeal. On May 27, 2009, counsel filed a Form I-290B and identified it as a "Motion to Reconsider." On motion, counsel contends the "Director never requested documentation regarding the company's ownership or subsidiary or affiliated relationships." Counsel also contends that the petitioner "attempted to comply with all requested of the U.S. CIS," and that the petitioner "should be given a fair opportunity to submit additional documentation to establish eligibility." In addition, counsel asserts that the petitioner submitted sufficient documentation to establish that the beneficiary will be managing an integral function of the organization.

Counsel's assertions do not satisfy the requirements of either a motion to reconsider or motion to reopen.

The regulation at 8 CFR 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although counsel has submitted a motion titled "Motion to Reconsider," counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel states on motion that the director should have sent a request for additional information, and that sufficient documentation was submitted to show that the beneficiary will manage an integral function of the organization. In reviewing the AAO's decision, it discussed in detail the issues presented by counsel. Counsel does not state that the AAO made an error in the application of law or Service

policy. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel for the petitioner contends that the director did not provide the petitioner with an opportunity to address the director's concerns through a Request for Evidence or a Notice of Intent to Deny. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. In the present case, the evidence indicated that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the denial and the dismissal of the appeal were appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

A review of the record and the adverse decision indicates that the director and the AAO properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

Counsel suggests that the director's adjudication of the petition was unfair. The petitioner has not demonstrated any error by the director in conducting his review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

Furthermore, the motion does not qualify as a motion to reopen. The regulation at 8 C.F.R. 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1] On motion, counsel for the petitioner has submitted a brief in support of the motion. A review of the evidence that the petitioner submits on motion reveals no fact that could be considered *new* under 8 C.F.R. 103.5(a)(2). The evidence submitted was either previously available and could have been discovered or presented in the previous proceeding, or it post-dates the petition.

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992)(citing INS v. Abudu, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

.The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the Associate Commissioner will not be disturbed.

ORDER: The motion will be dismissed. The director's and AAO's decisions will be undisturbed. The petition is denied.